GENERAL POWERS AND THE RULE AGAINST PERPETUITIES.

PROFESSOR GRAY thus states the general rule: "If a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad." [1]

To this, however, there is an exception: if within lives in being and twenty-one years from the time of the creation of the power there must come into the hands of the donee a right to exercise a general power to appoint by deed or will, the power is valid in its creation, although the donee may not exercise it within the time required by the rule.

Thus, if in a marriage settlement there be given to the unborn child of the marriage a general power to appoint by deed or will, it is clear that within lives in being at the date of the settlement and twenty-one years thereafter the power will come into the hands of one who may exercise it. But the actual exercise of the power may not occur until the end of lives not in being at the time of the settlement. The power, however, is valid in its creation, for within the proper time the donee has become completely *dominus* of the property, because he can appoint to himself. Such is the holding of Bray *v.* Bree.[2]

If, however, the marriage settlement conferred a general power on the unborn daughter of the marriage to appoint by deed or will, but required that such appointment should take effect only after the marriage of the daughter, there would be a condition precedent to the exercise of the power that the daughter must marry. She, therefore, would not become *dominus* of the property until that event had occurred, and the power, therefore, is void in its inception. That is Louisa's case in Morgan *v.* Gronow.[3]

In the same way, if the marriage settlement confers a general power upon the unborn children of the marriage to appoint by will only, the power cannot be exercised till the child dies. Then only

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[1] Gray, Rule against Perpetuities, 2 ed., § 473.

[2] 2 Cl. & F. 453; 8 Bligh, N. S., 568 (1834).

[3] L. R. 16 Eq. 1 (1873).

can the donee possibly become *dominus* of the property. That time is too remote. Hence the power is void in its inception. This is precisely the holding of Wollaston *v.* King [4] and Tredennick *v.* Tredennick.[5]

Suppose, however, that the power as created must be exercised, if at all, within lives in being and twenty-one years from the date of the creation of the power, so that the power is valid in its inception. Thus, suppose A. by his own ante-nuptial settlement or by the will of X. has a power to appoint among his issue and appoints by will to his daughter for life and then to such children of his daughter as reach twenty-one. Here A.'s power is valid in its inception because it must be exercised within lives in being at its creation, *i. e.*, within A.'s life. The remoteness, however, of an appointment made pursuant to such a power depends, according to Mr. Gray, on "its distance from the creation and not from the exercise of the power." [6] Hence the ultimate interest appointed to the grandchildren of A. who reach twenty-one is void.

Suppose, however, that A.'s power, instead of being a special power to appoint to his issue, is a general power to appoint by deed or will. Here it is held that the validity of the exercise of the power depends not on the distance of the interest appointed from the creation of the power, but on the distance of such interest from the time of the exercise of the power.[7] Why? Because it is said that at the time of appointment the donee is *dominus* of the property. "He has the absolute control over it. He can deal with the property as if he owned it in fee. . . . The appointment can be considered an appointment to the donee himself and then a settlement of his own property." [8] In short, the courts look at the substance of the situation and not the form. If the donee is at the time of appointment in all respects in a position like that of the absolute owner, then the validity of his act, so far as the question of

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[4] L. R. 8 Eq. 165 (1869).

[5] [1900] 1 I. R. 354. On the other hand, in 3 Dav. Prec. Conv., 3 ed., 156, note, it is said that until Wollaston *v.* King, *supra*, an appointment such as was made in that case would have been considered not too remote on the ground that the general power of appointment (whether exercisable by deed or will, or will only) is in substance part of the interest (a life estate) limited to the object of the said power (the life tenant).

[6] Gray, Rule against Perpetuities, 2 ed., § 473.

[7] *Id.*, § 524, and authorities there cited.

[8] *Id.*, § 524.

remoteness is concerned, is to be determined with reference to the time of the appointment.

Suppose now that the power given to A. in the case last put was a power to appoint by will only, and was as general as such a power could possibly be. Can A. by will appoint to trustees for his daughter's life and then upon trust for such children of the daughter as reach twenty-one? Is the appointment to the grandchildren valid?

Observe that there is no question whatever of the validity of the power in its creation. The power is valid to start with, for it must be exercised in lives in being at the date of its creation. The only question is whether in determining the validity of the exercise of the power the remoteness of the limitations created is to depend upon the time when the power was created or when it was exercised. If the former view be adopted the appointment to A's grandchildren is too remote. If the latter is correct then the gift to the grandchildren is valid. It is conceded that the position which may properly be taken depends upon whether at the time of appointment the donee is in substance, or practically, the owner.

Mr. Gray [9] insists that the donee is not "practically the owner; he cannot appoint to himself; he is, indeed, the only person to whom he cannot possibly appoint, for he must die before the transfer of the property can take place." When Mr. Gray says the donee cannot appoint to himself so as to enjoy the property during his life, we must agree with him. It follows inevitably that during the life of the donee he is not practically the owner. If this is what Mr. Gray means when he says that the donee is not "practically the owner," all must agree. But is that the important inquiry? Is it not essential to determine whether *at the moment of exercising* the general power the donee is practically the owner? For instance, if a donee were given a general power to appoint by deed or will when he reached thirty or married, it would be stupid to say that he was not practically the owner before he reached thirty or married, and, therefore, could not be practically the owner when he reached that age or married. In the same way it will not do to say that because a donee is not practically the owner before his death, he cannot be practically the owner at the moment of his

[9] Gray, Rule against Perpetuities, 2 ed., § 526 b.

death. In short, our real inquiry must be, is the donee with a general power to appoint by will only practically the owner at the moment of his death?

How is one to determine whether at a particular time the donee of a general power is practically the owner? The natural test would seem to be, can he do everything with reference to the property which is subject to the power that he could do if he were the owner? Thus, if the donee have a general power to appoint by deed or will at thirty, we say he can do everything at thirty with reference to the property subject to the power that he could do if he were the owner. In the same way when the donee has a general power to appoint by will only, we determine whether he is practically the owner at the moment of death by asking whether he can do everything with reference to the property subject to the power that he could do if he were the owner. We do not need to ask whether he can enjoy the property personally, because we know that no owner of property can at the moment of death enjoy it personally. His entire right of ownership consists in the power to dispose of it.

What, then, is there that an owner of property can do in the way of disposing of his property at the moment of his death which the donee of a general power to appoint by will cannot accomplish? Nothing! *Ergo*, the donee of a general power to appoint by will, if that power be valid in its inception, is, at the moment when he may exercise the power, practically the owner.[10] Rous *v.* Jackson,[11] *In re* Flower,[12] and Stuart *v.* Babington,[13] which proceed upon this premise and hold the power in A to appoint by will to have been well exercised when A appoints to his daughter for life and then to such of her children as reach twenty-one, are correct on principle. The direct repudiation in each of the contrary result reached in Powell's Trusts [14] should be approved. Mr. Gray's attempt to sustain Powell's Trusts on principle cannot be regarded as successful.

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[10] It does not really add anything to the weight of the argument that one having a general power to appoint by will, while he cannot appoint to himself, can appoint to his estate, and the question whether there is a lapsed devise or bequest under the donee's will or the property subject to the power goes in default of appointment, depends upon whether the donee has appointed to his estate first and then devised his own property, or has appointed direct to the objects of appointment. Chamberlain *v.* Hutchinson, 22 Beav. 444 (1856); *In re* Davies' Trusts, L. R. 13 Eq. 163 (1871).

[11] 29 Ch. D. 521 (1885).

[12] 55 L. J. Ch. 200 (1885).

[13] 27 L. R. Ir. 551 (1891).

[14] 39 L. J. Ch. 188 (1869).

Mr. Gray, however, not only attempts to support Powell's Trusts on the ground that it is sound upon principle, but he asserts that "the weight of authority seems to be with Powell's Trusts." [15] But opposed to Powell's Trusts are the three later English cases above referred to, in terms repudiating it.[16]

Mr. Gray, however, insists that in support of *In re* Powell's Trusts there are three English and two American cases. He says: "Wollaston *v.* King, Morgan *v.* Gronow and the other cases cited in note 2 to the preceding section [*i. e.*, Tredennick *v.* Tredennick, Genet *v.* Hunt,[17] and Lawrence's Estate [18]] stand together with Powell's Trusts in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power, in opposition to Rous *v.* Jackson."

The New York case of Genet *v.* Hunt may be in point in support of Powell's Trusts. There a marriage settlement provided for the wife for life with a power in her to appoint by will to any one, and in default of appointment to her heirs. She appointed to her children for life and then to their heirs. If the limitations appointed were measured from the date of the settlement the New York statute was violated, because the absolute power of alienation was suspended for three lives, including the lives of the children of the marriage, who were not *in esse* at the time their interests were created. The court in adopting the view of Powell's Trusts paid tribute to the powerful influence which Mr. Gray's views have had. They seem to have followed Powell's Trusts only because Mr. Gray said they ought to. In the Pennsylvania case of Lawrence's Estate the limitations created in the exercise of the power were valid even though the view of Powell's Trusts was adopted. The court, however, also paid tribute to the influence of Mr. Gray's views by announcing their preference for the rule of Powell's Trusts, apparently because Mr. Gray told them that that was the better view.

Clearly, however, Mr. Gray sets his chief reliance for the support of Powell's Trusts upon the English cases, namely, Wollaston *v.* King, Tredennick *v.* Tredennick, and Morgan *v.* Gronow. In these

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[15] Gray, Rule against Perpetuities, 2 ed., § 526 b.

[16] Rous *v.* Jackson, 29 Ch. D. 521 (1885); *In re* Flower, 55 L. J. Ch. 200 (1885); Stuart *v.* Babington, 27 Ir. L. R. 551 (1891).

[17] 113 N. Y. 158, 21 N. E. 91 (1889).

[18] 136 Pa. 354, 20 Atl. 521 (1890).

cases the question was as to the validity of the power in its inception. In Wollaston *v.* King and Tredennick *v.* Tredennick the general power was given by a marriage settlement to the unborn child of the marriage, to be exercised by will only. The fact that it was a general power or that the donee became *dominus* of the property or practically the owner at the time of his death was immaterial, for that did not happen soon enough. The time was so late that the power was void in its inception. In Morgan *v.* Gronow the situation was the same except that the general power was given by a marriage settlement to an unborn daughter of the marriage to be exercised upon her marriage by deed or will. Here the donee when she married could exercise the power by deed or will, yet the power was void for remoteness in its inception because the marriage of the daughter might happen at too remote a time. The principle applicable is the same as that acted upon in Wollaston *v.* King.

To declare, as Mr. Gray does, that Wollaston *v.* King, Tredennick *v.* Tredennick, and Morgan *v.* Gronow "stand together with Powell's Trusts in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power" is to confound two entirely different situations — one where the question is as to the original validity of the power at the time of its creation; the other where the power is valid when created but where the question is, has it been validly exercised? In the first case the fact that the power conferred upon an unborn person is a general power to appoint by deed or will may cause it to be validly created because the donee will have a complete right to exercise it at the commencement of his life, or at least when he is twenty-one, and at that time — which is not too remote — he will become practically the owner. On the other hand, if he were given the power to appoint by will only, he could not possibly exercise the power till he died. He could not possibly become "practically the owner" till then. Hence the power is void in its inception. In the second case, the fact that a general power to appoint by deed or will is conferred which is valid, causes the validity of the limitations created in the exercise of the valid power to depend on their remoteness from the date of the execution of the power. This is because the donee is practically the owner *at the date of the exercise of the power.* The donee is equally the *dominus* or practically the owner at the date of the exercise of a general power to appoint by will

only, because at that time he can do all that any owner can do with his property upon a similar occasion.

In short, the fact that a power is a general power to appoint by deed or will or a general power to appoint by will only has an entirely different significance, depending upon whether you are considering the validity of the power in its inception or the validity of the exercise of a power admittedly valid in its inception.

Albert M. Kales.

NORTHWESTERN UNIVERSITY LAW SCHOOL.